

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN COLLINS,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262289

St. Joseph Circuit Court

LC No. 04-012377-FC

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). Defendant appeals by right. We affirm.

The victim testified that defendant represented to her that he worked for a modeling agency. As a result, the victim agreed to permit defendant to photograph her in a Three Rivers hotel room. Defendant promised the victim he would pay her \$5,000 for the pictures. In the hotel room, defendant took a handgun from the area of his ankle and placed it on the table. Defendant also posed the victim on a bed. After taking a few pictures, defendant asked the victim to lie on her belly. When she complied, defendant sat on her lower back and began touching her, ignoring the victim’s attempts to resist him. Defendant penetrated both her vagina and rectum with his penis.

Defendant first claims that the trial court erred in allowing the prosecution to present evidence of his prior bad acts. Specifically, defendant asserts that the testimony of two other women was offered for the sole purpose of establishing his character and propensity to commit crimes and that their testimony was not relevant to the issue of consent. We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). The trial court abuses its discretion when fact and logic “evidences perversity of will, defiance of judgment, and the exercise of passion or bias,” or another words, “when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling.” *Id.*

Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. MRE 404. But evidence of other crimes, wrongs, or acts may be admissible to demonstrate motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake

or accident. MRE 404(b)(1); *Ullah, supra* at 674; citing *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Evidence of uncharged misconduct may be admissible if the uncharged acts share sufficient common features with the charged act to support an inference that they are manifestations of a common plan, scheme, or system. *People v Sabin (On Remand)*, 463 Mich 43, 63, 67; 614 NW2d 888 (2000).

In the present case, defendant's interactions with the other women share sufficient common features with his interaction with the victim to enable a reasonable person to infer that defendant acted in accordance with a common scheme or plan. Defendant represented to each of the three women that he was in the modeling business or had connections to that business. He also told all three women that they could earn a substantial amount of money for modeling, and he used a disposable camera to take pictures of each of the three women. Because defendant's interactions with the other women shared sufficient common features with his interaction with the victim, the trial court did not abuse its discretion in holding that the testimony of the other women was offered for the proper purpose of establishing defendant's common plan or scheme.

Evidence of uncharged acts is not admissible, however, simply because it is offered for a proper purpose under MRE 404(b). *Ullah, supra* at 675. The evidence must also be relevant under MRE 402. *Id.* "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). To be relevant, evidence must be material: it must be related to "any fact that is of consequence." *Id.* at 388, quoting MRE 401.

Defendant and plaintiff agree that the issue whether the victim consented to the sexual intercourse was the key issue at trial. At trial, defendant and the victim presented directly contradictory evidence on whether the victim consented. To determine whether the victim consented, "the trier of fact must look to the attendant circumstances and the parties' behavior prior and subsequent to the act of intercourse." *People v Oliphant*, 399 Mich 472, 491; 250 NW2d 443 (1976). In looking at the parties' behavior, the Supreme Court said:

It then becomes material to know whether [the] defendant orchestrated those circumstances to give the appearance of consent and to make proof of nonconsent difficult. Relations at one moment casual and friendly could, in the next, turn ugly and threatening, and an act of intercourse forced upon an unwilling woman would be no less rape because the behavior of the defendant had for the greater portion of the time spent together been friendly and nonthreatening. [*Id.*]

Here, the other acts evidence was relevant to the issue of consent. The jury could infer from it that defendant used a common scheme or plan in each situation to orchestrate the circumstances to give the appearance of consent before engaging in nonconsensual sex acts.

One of the other women consented to allow defendant to photograph her, which provided the appearance of consent to the inappropriate touching, under the guise of being posed, that accompanied the photography session. The inappropriate touching and poses turned the friendly interaction into an ugly one. The third woman, too, agreed to be photographed by defendant. Defendant later became "very pushy." Although this woman would not describe her sexual relations with defendant as being forced, her testimony revealed that they were the product of

defendant's manipulation. Defendant orchestrated the situation to provide the appearance of consent. The victim's situation was similarly orchestrated. She agreed to be photographed, assumed a pose pursuant to defendant's instructions, and was sexually assaulted under circumstances where it appeared that the situation could have been consensual. The common scheme illustrated by defendant's other acts was relevant to whether the victim consented. Thus, the evidence was admitted for a proper purpose, was material and probative, and there was no demonstration that the probative value of the evidence was outweighed by unfair prejudice. MRE 404b. Thus, the trial court did not abuse its discretion in admitting the evidence.

Defendant also argues that the trial court erred when it instructed the jury separately from the rest of the consent instruction that the victim could not have consented as a matter of law to the sexual intercourse if a gun was present. We review an unpreserved claim of instructional error for plain error affecting the defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Further, we review jury instructions in their entirety to determine whether the trial court erred in instructing the jury. *Ullah, supra* at 677.

The trial court quoted CJI2d 20.27 almost verbatim when it instructed the jury on the issue of consent. We recognize that the Michigan Criminal Jury Instructions have not received the official sanction of the Michigan Supreme Court. *Id.* But the fact that the trial court read CJI2d 20.27 in its entirety refutes defendant's claim that the trial court separated the question of whether defendant displayed a weapon from the rest of the consent instruction. The trial court read the consent instruction as a whole. Moreover, this Court has previously found no error in reading an instruction "virtually identical" to CJI2d 20.27. *Id.* at 677-678.

Additionally, a fair reading of the consent instruction does not imply that, if defendant displayed a gun in the hotel room, the victim as a matter of law could not have consented to the sexual intercourse. The trial court first instructed the jury that it needed to consider all the evidence in determining whether the victim consented. The trial court then instructed the jury that, in making this determining, it may be helpful to consider whether the victim was free to leave the hotel room and whether defendant displayed a gun. Thus, the trial court clearly instructed the jury that defendant's alleged display of a gun was only one possible factor to be considered in determining whether the victim consented. Accordingly, the trial court's instruction was not likely to lead a reasonable person to believe that, if defendant displayed a gun, the victim as a matter of law could not have consented. The trial court did not err, much less plainly err, in instructing the jury that it could consider whether defendant displayed a gun to determine whether the victim consented to the sexual intercourse.

We affirm.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey